Supreme Court, U.S.
FILED
SEP 27 1995
CLERK

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NO. 95-368

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JAMES SMITH, SILAS HARDISON, DAVID ROBINSON, JAMES CONWAY, RITA KRAPF, NESBY MOORE, VINCENT SCHOEMEHL,

Petitioners

v.

TIMOTHY RUSH,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATMENT OF QUESTION PRESENTED

Respondent respectfully suggests that the issue framed by Petitioner is more accurately stated as follows:

Whether racially polarizing remarks made by a White trial judge directly to an all White jury in the context of a civil rights action brought by an African-American, whose occurrence witnesses are also African-American, constitutes plain error.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case is substantially correct.[1] However, a more detailed statement is necessary in order that the Court may have a better picture of prejudice resulting from the racially polarizing comments of the trial court, and the circumstances under which those comments were made.

The panel of jurors from which the jury was selected contained only two African-Americans. Defendants utilized preemptory challenges to strike both of these potential jurors. However, one of the African-Americans was ultimately on the jury as a result of a Batson type challenge. (T. Vol. I, 155-156.)

On the morning of the fourth day of trial, there had been a snow storm in St. Louis and there was approximately 10 to 12 inches of snow on the ground. The African-American juror did not appear for trial on that date due to the weather conditions and the necessity of using public transportation.

A marshall volunteered to pick up the juror and left to do so. However, he was recalled by the trial judge when the judge was informed of such after telephoning chambers personnel. Counsel was informed that the judge would address the problem of the missing juror when he arrived at court. When the judge arrived, approximately one hour later, he refused to allow Plaintiff the time to seek alternate transportation for the African-American juror. The majority of the Eighth Circuit Appellate Panel

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[1] Petitioners' Statement at page 4 that Rush was shot in the abdomen is incorrect. Rush was shot in the upper left chest and the bullet was surgically removed from his abdomen. His attending surgeon testified this trajectory was consistent with Rush standing bent at the waist when shot, as Rush testified, and not standing upright as Defendants contended. (T. Vol. III 127, 131.)

explained the trial judge's denial of the request to send a taxi cab for the African-American juror because of a concern over delay and because the court found it inappropriate for a party to provide transportation for a juror. Rush v. Smith, 45 F.3d 1197, 1201 (8th Cir. 1995). Although these reasons were set forth by the trial judge in his post-trial order denying Appellant's Motion for New Trial, on the day of the trial in question, the Judge held a different view:

> you'll have to get your own jurors, it's 10:00, you've known about this situation since 9:00. If you felt like you wanted to do it yourself, or get a cab or something like that and get her in, I would have no problem with that . . ..

Id. at 1205 (quoting joint appendix "JA" 156).

Although the Court would not allow the marshall to pick up the sole African-American juror, and would not allow Plaintiff time to have a cab sent, at a later point in the trial after another juror had been dismissed, the Judge instructed the remaining all White jury that if any of them were unable to get into court or had any excuse for not coming to court, he would send the marshall to pick them up. (T. Vol. IV, 201-202.)

Subsequent to these comments, counsel for Rush requested to make a statement for the record regarding the absence and dismissal of the juror:

> Mr Singer: (Rush's counsel): "We have the marshall here, had agreed, and was beginning on his way to pick up this juror when the Court informed and indicated to him not to. We were then told that the Court would address this matter when the Judge arrived. We were here for the scheduled motions at a quarter to nine this morning and the Court has just arrived here . . .. Judge, this is a very serious matter. She was left on the jury with

> reference to a (Batson) Motion and she's an elderly woman and she informed the Court that her only transportation here was public transportation. That is a very serious prejudice to our client's case . . . (T. Vol. IV, 5-6).

Counsel for Rush then stated to the Court his understanding that the courthouse had, in fact, been closed due to the snow storm. The Judge then responded that counsel's information was incorrect and "I'm telling you that you've misinformed the court about the courthouse closing. . . you better get your facts straight." (T. Vol. IV, 7.) The following occurred immediately thereafter:

> Mr. Singer: Well, Judge, the information I had received was from your staff."
>
> The Court: "Okay. Well, that's not true. You get your information from me if you will, and I've tried to give you accurate information."
>
> Mr. Singer: "They were here."
>
> The Court: "Well, now you got that dig in twice . . . I don't need any snide remarks about the time of my arrival (T. Vol. IV, 7-8).

These comments demonstrate the trial judge's inappropriate demeanor and hostility directed toward counsel for Rush. The comments made by the White trial judge directly to the all White jury should be considered in the context of this environment of hostility. Shortly after this exchange, the jury was called into the courtroom, and among the judge's opening remarks were the following:

> I'm not a damned fool. I haven't been around here for 76 years and not found out that the races have a tendency to stick together and that may be good or bad, but whatever it is, it exists. (T. Vol. IV, 19.)

During these remarks, the judge also told the jury that he had been scolded by Rush's counsel regarding his time of arrival.

The comments of the trial court must be considered in the context of the trial of this case. Resolution of this matter required the jury to choose from two conflicting accounts of what happened during the early hours of New Year's Day, 1990. A brief review of the record will demonstrate the critical importance of the jury's assessment of witness credibility, which was directly commented upon by the trial court, and the clear lack of credibility on the part of Defendants' two main witnesses.

Rush, who is African-American, claimed that, at the time of the incident, he was in his home with his grandmother and cousin, both of whom are also African-American. A friend, Michael Mayhorn, was in the back yard celebrating the New Year by firing a shotgun into the air. Rush's grandmother asked him to have Mayhorn stop firing the shotgun and come into the house. Rush went to the kitchen door of his residence, barefoot and wearing only pajama bottoms, in order to get Mayhorn to stop shooting and come into the house. Rush testified that while bent over, standing sideways between the storm door and inner wooden kitchen door, he was shot in the chest by Defendant Smith. The testimony of Rush's occurrence witnesses, all of whom were African-American, corroborated his version of the facts, and was consistent with their statements given to police on the date of the incident.

The testimony of the two police officers was diametrically opposed to that of Rush and his witnesses. They testified that they received a radio call to Rush's neighborhood to respond to a call that shots had been fired in the area. According to them,

they were fired upon by an individual with a shotgun as they approached Rush's back yard. Smith testified that during this encounter, anywhere from 25 to 31 rounds from a 12-gauge bolt action shotgun were fired directly at him and Hardison. There was no damage to any structure or fixture from this massive amount of firepower. They testified that the alleged suspect would hold the gun to his shoulder, fire four to five rounds, reload and fire another four to five rounds. However, under laboratory conditions, the police firearms expert could only get the weapon to chamber one round at a time, which would necessitate reloading after each shot. When this discrepancy was noticed by a homicide detective, the firearms expert re-examined the weapon, made certain repairs and maintenance and only then was able to get the weapon to hold multiple shells so that more than one shot could be fired without reloading. The officers testified that they observed two men standing near the steps to the rear entrance to the Rush home. However, neither officer could identify Rush as being one of the two men in the rear yard. (T. Vol. VI 101, 103.) Nor could any other witness identify Rush as having been in the rear yard.

Rush was indicted in connection with this incident on charges of First Degree Assault, Armed Criminal Action and Unlawful Use of a Weapon. (T. Vol. II, 53.) These charges were subsequently dropped. Robert Craddick, an Assistant Circuit Attorney for the City of St. Louis testified that after he explained to Smith that the physical evidence, in particular the pattern of bullet holes in the door, was inconsistent with his version of the incident, Smith was willing to change his explanation of how the shooting occurred and admitted that Rush could well have been inside his residence

between the two doors when shot. Craddick also testified that Smith attempted to have the charges reinstated due to his fear that he would be sued if Rush was not jailed. (T. Vol. II, 128-129, 142.)

Significantly, Smith admitted at trial under cross examination, that Rush may well have been in the kitchen of his home, and not outside in the rear yard, when Smith shot him: "There's nothing to say I couldn't have possibly hit him with the bullet that went through the screen." (T. Vol. VI, 191.) This was also the conclusion of the internal affairs investigator who conducted the separate investigation of the incident on behalf of the police department. (T. Vol. II, 102.)

Defendants' main non-police witness, Pamela Rudderforth, who is White, at the time of the incident lived in a two-story house directly behind and to the north of Rush's residence. She testified that on the evening in question she was able to clearly observe the shooting incident from her second floor bedroom window. (T. Vol. V, 41-52.) However, Karl Kinsky, a member of the Bar, went to her home in the Spring of 1990, along with an investigator from the Public Defender's Office. Mr. Kinsky testified that, during daylight hours, he looked through Rudderforth's bedroom window and was unable to see what Rudderforth alleged she could see in the middle of the night. (T. Vol. II, 111-112.) Photographs were taken at that time which were introduced into evidence and verified Kinsky's testimony that, due to physical obstructions, the area of the alleged shooting could not be seen from Rudderforth's window. (T. Vol. II, 112.) Plaintiff's expert, D. Wayne Heil, also testified that, during daylight hours, he looked through the

second floor bedroom window of Rudderforth's home and was not able to see what she alleged she could see during darkness. (T. Vol. II, 188-189, Vol. III, 55.) To verify this, Heil took photographs through both sides of the double pane window. (T. Vol. II, 188-189.)

It is also highly significant that, at the time of the incident, Rudderforth was harboring a fugitive in her home wanted on felony charges of child molestation. (T. Vol. V, 69-70.) She testified that the police knew the fugitive was there, but chose not to arrest him. (T. Vol. V, 73.)

Both Smith and Hardison testified, and stated in the official police report, that they were able to see the color of the trousers worn by the two subjects in the rear of the Rush home. (T. Vol. VI, 111, 163.) However, the police evidence technician took a photograph of Smith and Hardison standing in the rear yard of the Rush residence, behind a vegetation-covered fence, where the color of their trousers could not be seen. (JA 224.) The evidence officer testified that there was absolutely no reason for taking this photograph other than to depict where the two subjects had been standing at the time they were encountered by Smith and Hardison. (T. Vol. VII, 174.) Likewise, the trial court recognized that this photograph was an obvious reenactment. (T. Vol. V 24.)

Medical evidence was presented, through the deposition of Dr. Harry D'Augustino, that the bullet which struck Rush entered through the upper left portion of his chest and was removed from the area of his abdomen. (T. Vol. III, 127.) According to the doctor, this was consistent with Rush standing bent at the waist at

the time that he was shot. (T. Vol. III, 131.) This was consistent with Rush's testimony that he was bent peering out the back door of his house when shot, rather than standing upright as urged by Defendants. Mr. Heil, Plaintiff's expert, also testified that the trajectory of the wound was consistent with Rush standing bent over in the manner which he described. (T. Vol. II, 175). This evidence was unchallenged by Defendants.

During the course of the shooting incident, Smith fired five rounds from his revolver. No shots were fired by any police officer other than Smith.[2] (T. Vol. VI 115, 168, 171.) All five of the bullet projectiles from the shots fired by Smith were subsequently accounted for. (T. Vol. III, 74.) Two bullets were recovered from the interior wooden door leading from the kitchen to the rear yard of Plaintiff's home. (T. Vol. III, 48, 51, V. 38.) One bullet was recovered from Plaintiff during surgery. (T. Vol. III, 127.) One bullet was recovered on the kitchen counter of Plaintiff's home. (T. Vol. I, 195-196.) The fifth, and final, bullet was recovered from a second floor bedroom wall. (T. Vol. II 163-164.)

Of the five projectiles, only two were recovered by the police department: the bullet in Plaintiff's abdomen and the bullet in the lower portion of the wooden kitchen door. (T. Vol. III, 48, 51.) The bullet on the kitchen counter was found by Margaret Seltzer, Plaintiff's grandmother, and turned over to members of the Public Defender's staff. (T. Vol. I, 195-196.) The remaining two

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[2] The opinion of the Court of Appeals erroneously lists the number of shots fired by the police during the course of this incident. There was no dispute at trial that only five rounds had been fired by police.

bullets were recovered by Plaintiff's expert, D. Wayne Heil: the bullet in the upper portion of the wooden kitchen door and the bullet from the upstairs bedroom wall. (T. Vol. II, 163, Vol. III, 50.)

Four of those five bullets were positively identified through ballistic comparison as having been fired from Defendant Smith's gun. Those bullets so identified were the two from the interior rear kitchen door (T. Vol. II, 218, Vol. VI, 12-13), the bullet from the second floor bedroom wall and, the bullet from Rush's abdomen (T. Vol. III, 56, 167, 220-221, 219, Vol. VI 13-14). The fifth bullet, the one recovered from the kitchen counter and subsequently turned over to the public defender's office, was lost by that office. (T. Vol. I 195-196.) However, there was evidence from two witnesses, both members of the Bar and former public defenders, that the bullet was silver in color (T. Vol. II, 60, 106). Winchester-Western is the only company that manufactures silver tipped bullets - the type carried by St. Louis police officers. (T. Vol. III, 74, Vol. IV, 81.)

Each of the five bullets fired by Smith was traced to a specific bullet hole into the rear of Rush's home. There was one bullet hole through the kitchen window to the west of the rear kitchen door. This was the bullet recovered by Margaret Seltzer, Rush's grandmother. (T. Vol. I, 195-196). There was one bullet hole through the second floor bedroom window (T. Vol. II, 28, 56, 163-164). There were three bullet holes through the outer rear storm door: one through the top glass portion, one through the

middle screen portion, one through the bottom metal portion. (JA 138-139.) There was no damage to the storm door or the inner door before this incident. (T. Vol. I 184-186, Vol. II 19, 49.)

No evidence was presented that any of these entrance holes into the Rush home were anything other than bullet holes. The official police report prepared on the incident lists the four holes on the first floor of the residence as apparent bullet holes. (JA 138-139.) Nowhere in that official report is there any question that these were not bullet holes. A second investigation was performed by the Police Internal Affairs Division, as is done in all incidents where someone is shot by a police officer. That report also notes the four bullet entry holes into the rear first floor of the Rush home. (JA 112-118.) Like the homicide report, the Internal Affairs report does not question the fact that these four holes are bullet holes. None of the homicide detectives who conducted the initial investigation of this incident could testify that these entries into the Rush home were anything other than bullet holes. (T. Vol. IV, 194, Vol. V, 72, 121-124.) Plaintiff's expert, D. Wayne Heil, testified that there was nothing inconsistent with these being bullet holes and that the holes evidenced a pattern of fire. (T. Vol. II, 165, 170, 172, 205, 226, Vol. III, 111.) Even Defendants' expert, William George, could not offer an opinion that these five holes were anything other than bullet holes. (T. Vol. VI, 14.) Every witness to testify at trial who discussed the nature of the holes in the Rush residence stated that all of the holes were bullet holes, apparent bullet holes, or could offer no opinion that they were anything other than bullet holes.

The most significant piece of physical evidence was the rear storm door which contained three bullet holes. The bullet hole through the top glass portion of the storm door had a corresponding bullet hole in the inner wooden door of the kitchen. (JA 138-139.) A bullet was recovered by Plaintiff's expert from the upper portion of the wooden inner door which was ballistically matched to Smith's gun. (T. Vol. VI, 13.) The bullet hole through the lower metal portion of the rear storm door also had a corresponding bullet hole in the lower wooden portion of the inner door. (JA 139.) This bullet was recovered by the police and was ballistically matched to Smith's gun. (T. Vol. VI, 12, Vol. II, 218.) There was no corresponding damage to the inner wooden door from the bullet that entered through the middle or screen portion of the storm door. (T. Vol. III, 40.) The lack of a corresponding hole in the inner door meant that there had to be an animate object between the doors. (T. Vol. II, 205.) That animate object was Timothy Rush.

REASONS FOR DENYING THE PETITION

INTRODUCTION

In the case at bar, the Court of Appeals for the Eighth Circuit, in its majority opinion, did not depart from prior Supreme Court precedent in the context of reviewing for plain error judicial comments appealing directly to the racial bias or xenophobic tendencies of the jury. The Court of Appeals for the Eighth Circuit acted well within its remedial authority in reversing as plain error racially polarizing comments made by a W White judge to an all White jury in the context of a civil rights action brought by an African-American whose occurrence witnesses were also African-American.[3]

The opinion by the Eighth Circuit Court of Appeals is not in conflict with decisions of other Courts of Appeals. Research has failed to disclose a single case, other than the case at bar, where a federal trial judge has directed comments to the jury which appeal directly to the inherent racial bias of the jury.

A grant of certiorari in this case would proclaim to the American public that in this day and age such egregious appeals to

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[3] Of the two main police Defendants, one was white and one was African-American. Also in the courtroom during the entire presentation of Rush's case were an additional five police Defendants, all of whom were white. These additional white officers, sued on a conspiracy basis, were later dismissed from the case by Rush. The members of the Board of Police Commissioners, a racially diversified group, were also named as Defendants. However, no member of the Police Board ever appeared at trial. Thus, six of the seven Defendants present during trial were white.

bias and prejudice may sometimes be tolerated in the courts of the United States.

Accordingly, this Court should deny certiorari in this matter.

I. THE PETITION SHOULD BE DENIED BECAUSE THE QUESTION PRESENTED HEREIN HAS NOT BEEN DECIDED BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN A MANNER INCONSISTENT WITH DECISIONS OF THE SUPREME COURT.

More than sixty-five years ago this Court, in considering a case where counsel appealed to the regional bias of the jury, remarked that such comments, and others of similar character, have been "so often condemned as an appeal to . . . prejudice as to require no comment." New York Cent. R. Co. v. Johnson, 279 U.S. 312, 319 (1929). Two years later, this Court again considered the issue of appeals to regional bias by counsel and held, "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 521 (1931). That comments appealing to regional bias, as so strongly condemned by this Court, are less incendiary than direct appeals to racial prejudice is obvious.

Other courts that have considered appeals to the bias or prejudice of the jury have universally condemned the practice. e.g. United States v. Doe, 903 F.2d 16, 28 (D.C. Cir. 1990). (Reference in closing argument to defendants as Jamaicans held plain error - "Undeniably, prosecutorial remarks kindling racial or ethnic predilections can violently affect a juror's impartiality. Comments of the sort are especially egregious. . ."); United States v. Janis, 831 F.2d 773, 778 (8th Cir. 1987), cert. denied, 484 U.S. 1073, (remarks concerning Italians); United States v. Chase, 838

F.2d 743, 750 (5th Cir.) cert. denied, 486 U.S. 1035, (1988) (reference to "Colombians"); Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022, (1986) ("Even if brief, use of race as a factor in closing argument is improper"); Rojas v. Richardson, 703 F.2d 186, 192 (5th Cir. 1983) reversed on other grounds 713 F.2d 116 (single reference to party as illegal alien is obvious and blatant appeal to racial and ethnic prejudice and is plain error); Gearhart v. Uniden Corporation of America, 781 F.2d 147, 153 (8th Cir. 1986) (reference to foreign parent corporation could prejudicially appeal to xenophobia). There is simply no doubt that appeals to the bias of the jury are totally out of place in a federal courtroom. Appeals which tend to create feelings of hostility are so plainly repugnant that their universal condemnation requires no comment. Pappas v. Middle Earth Condominium Association, 963 F.2d 534 (2nd Cir. 1992) (citing New York Cent. R. R. v. Johnson, 287 U.S. 310).

It is much too late in the day to treat lightly the risk that racial comments may fan the flames of racial bias and influence the verdict of the jury. United States v. Doe, supra at 21. That the racially polarizing comments in this case came from the Court rather than from counsel, significantly magnifies the error. A trial judge has a duty to maintain an atmosphere free from prejudicial comment. "A prejudicial comment from the bench is worse than all others because it has the air of official sanction." Rush v. Smith, et al., 56 F.3d 918, 921 (8th Cir. 1995) (en banc).

In the more subtle and indirect context of racially-based peremptory challenges, which are not overtly made to the jury, this Court has remarked, ". . . the Court has not only made itself a

party to the [biased act], but has elected to place its power, property and prestige behind the [alleged discrimination]. . . and in a significant way has involved itself with invidious discrimination." Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 624 (1991). These comments were not from an advocate, but from the court, which is to be fair and impartial in all circumstances. "A trial judge must be especially cautious and circumspect in language and conduct during a jury trial. The judge must be fair to all parties and not do or say anything that might prejudice either party in the eyes of the jury." Coast to Coast Stores v. Womack-Bowers, 818 F.2d 1398, 1401 (8th Cir. 1987). More than a century ago, this Court recognized the vital role a judge plays during a jury trial and explained the need for a strict standard of judicial conduct." It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his slightest word or intimation is received with deference, and may prove controlling." Starr v. United States, 153 U.S. 614, 626 (1894); Accord Travelers Ins. Co. v. Ryan, 416 F.2d 362, 364 (5th Cir. 1969) ("By reason of his role, quickly observed by jurors, the trial judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted on with alacrity and without question.")

Here, the appeal to bias was injected into the proceedings by a federal trial judge, robed in black, seated in a paneled courtroom, in a federal courthouse, in front of an American flag,

admonishing an all White jury that all the races have a tendency to stick together and that might in fact be good, or it might be bad.

The majority of the Eighth Circuit Appeals Panel characterized these comments as, ". . . beyond inappropriate: they egregiously and obnoxiously flaunt even minimal standards of judicial propriety and integrity . . . behavior that has no place in the courts of the United States," Rush v. Smith, et al., supra at 1202 (panel decision). The dissent characterized the comments about racial solidarity as: "reprehensible" "such insidious notions have no place in society, let alone our courtrooms." "Completely intolerable." Id. at 1204, 1207. The majority of the Eighth Circuit En Banc decision characterized the comments as "aberrant behavior" "outrageous" "completely intolerable," Rush v. Smith, et al., supra at 921, 922, 923. As previously noted, research has disclosed no other cases where a federal trial judge has directed racial remarks to a jury. Not only is the error magnified because it was the court, rather than counsel, that made the comments, but also, the error is magnified because of the inherently biased nature of the comments themselves. This was not the usual case of excessive questioning of witnesses or an improper comment on evidence. These comments went well beyond any issue in, or the merits of, the case. The comments of the trial court regarding racial solidarity could well suggest to the jury that Rush and his witnesses gave a consistent account of the shooting incident because of their race, different from the jurors, rather than their sworn duty to truthfully relate the circumstances under oath. The jury might also have reasonably interpreted these comments as a directive from the trial judge that it might be inappropriate to

decide the case along racial lines. These comments strike at the very heart and core of basic fairness and the integrity of judicial proceedings.

It is beyond dispute that "a fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In Re Murchison, 349 U.S. 133, 136 (1955). In Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980), this Court recognized that the "requirement of neutrality in adjudicative proceedings" serves dual interests of equal importance, as "it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." In order to perform its high function in the best way "justice must satisfy the appearance of justice." Murchison, supra, at 136 (quoting Offut v. United States, 348 U.S. 11, 14 (1955). The limits of tolerance for inappropriate comments to the jury appealing to bias or prejudice is defined not only by case law, but also by that fundamental sense of fairness that guides our system of justice. Pappas v. Middle Earth Condominium Ass'n., supra at 539.

Here, the comments of the trial court were different from all other cases located where commentary by the court was called into question. This difference, where comments appeal to racial bias or prejudice, is not one of degree, but of kind as they induce a wholly different magnitude of prejudice. Rush v. Smith, supra at 922 (en banc); United States v. Doe, supra at 26. The focus of appellate review in all cases involving pleas to the bias of the

jury is whether potential prejudice exists. Pappas v. Middle Earth Condominium Ass'n, supra at 540.

Cases which have considered counsel's inappropriate appeals to the prejudice or xenophobic tendencies of the jury have held that it is only the possibility of prejudice that is required for reversal. Id. at 541 (appeal to regional bias so inherently improper as to raise the distinct possibility regionalism infected the trial); Rojas v. Richardson, supra at 190, (single reference to party as illegal alien - obvious and blatant appeal to racial and ethnic prejudice could have placed a prejudicial gloss); Gearhart v. Uniden Corporation of America, supra at 153 (reference to foreign corporation could prejudicially appeal to xenophobia); Hong v. City of St. Louis, 698 F.Supp. 180, 182 (E.D. Mo. 1988) (reference to party's position with government of China could have prejudicially appealed to xenophobia). The reason courts have applied this standard of review is because of the extreme volatility of such comments coupled with their total repugnancy to concepts of justice and the near impossibility of establishing actual prejudice.

When constitutional error calls into question the objectivity of those charged with rendering a judgment, a reviewing court cannot assume regularity, nor can it evaluate the resulting harm. When there is some basis for believing a biased judgment may have been rendered, actual motivations are hidden from review and it must be presumed the process was tainted - there must be a reversal because the effect of the violation cannot be ascertained. This is the only effective remedy for such a violation. Vasquez v. Hillery, 474 U.S. 254, 263 (1986). Whether inappropriate remarks

result in actual prejudice can only be determined by examination into the state of mind of each individual juror. United States v. Bland, 697 F.2d 262, 266 (8th Cir. 1983); Rush v. Smith, supra at 923 (en banc) (because of the impracticality of determining the effect of the racially-divisive remark on the jury, makes requiring a showing of actual prejudice tantamount to declaring such egregious comments unreviewable). The near, or actual, impossibility of determining whether or not the jury was infected by actual prejudice in this case is further complicated by U. S. District Court, Eastern District of Missouri Local Rule 16(d), which prohibits counsel from interviewing a juror unless specifically ordered to do so by the court.

Here, the double barrel contaminant of racially divisive remarks addressed directly to the jury by the trial court is so egregious and the likelihood of prejudice so great, that this is the type of matter which should clearly come within that rare category of plain error recognized by this court in United States v. Olano, 113 S.Ct. 1770, 1778 (1993), that can be corrected regardless of the effect on the outcome of the trial. This was not a mere "trial error" as urged by Petitioner. In Arizona v. Fulminante, 499 U.S. 279 (1991), this court, in a criminal case, distinguished between "trial error" and "structural defects" for the purpose of plain error analysis. Trial error is said to be "error which occurred during presentation of the case . . . which may therefore be quantitatively assessed in the context of other evidence." Id. at 307. The majority of the cases cited by this Court as constituting trial error involved erroneous admission of evidence or inappropriate jury instructions. None involved trial

court comments appealing to the xenophobic tendencies of the jury. Id. at 306-307. Trial error is fundamentally different from structural defects in the constitution of the trial mechanism. Examples of structural error defying harmless error analysis are: the presence on the bench of a judge who is not impartial and unlawful exclusion of members of defendant's race from a grand jury. Id. at 309. Here, the comments of the trial court did not involve the presentation of evidence and are not subject to quantitative analysis with other evidence in the case. Vasquez v. Hillery, supra at 263; United States v. Bland, supra at 186. That such incendiary comments can violently affect a juror's impartiality and infect the entire proceeding is obvious. The probability of that occurring is intensely heightened when such egregious comments have the aura or stamp of official sanction.

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. . . [it] destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. . . such discrimination not only violates our Constitution and the laws enacted under it, but is at war with our basic concepts of a democratic society and representative government.

Rose v. Mitchell, 443 U.S. 545, 555, 556 (1979).

The bias conveyed to the jury via the judge's racially-divisive comments was not the only problem concerning the African-American juror. It was also error for the Court to excuse her in the first place. Her only problem with attendance was a transportation problem due to inclement weather and her desire not to come out in bad weather. See U.S. v. Tabacca, 924 F.2d 906, 914-915 (9th Cir. 1991) (abuse of discretion to discharge juror

with transportation problem, rather than continue case for one day). When her transportation problems became apparent, the judge recognized that her absence was likely to be detrimental to Rush. (R. Vol. IV, 4-5). At the onset, this elderly lady was empaneled due to the importance that Rush be racially represented on the jury. Jurors may not, of their own volition, decide whether or not they will serve. The Clerk of the United States District Court summons jurors from their employment or other pursuits, their freedom of movement is constrained and they are subject to public scrutiny and examination. Once the jury is sworn, absent extreme circumstances, it is the right of the litigants to have the jury in whole remain and consider the case. Although she was initially placed on the jury as a result of an objection to Defendants' exercise of a peremptory strike and the judge was fully aware that her absence would benefit of defendants, he refused to allow the marshall to pick her up, refused to send a cab, refused to allow Plaintiff to arrange transportation and dismissed her, rather than allow for a short continuance. The protections of Batson v. Kentucky, 476 U.S. 79 (1986) and Edmonson v. Leesville Concrete Co., Inc., supra, ring hollow and evaporate in these circumstances.

The trial court's unwillingness to have court personnel pick up the African-American juror, and refusal to allow alternate transportation, coupled with his subsequent admonition to the remaining all White jury that he would use court personnel to ensure that they were in attendance, may well have magnified the court's racially polarizing comments.

Because discrimination on the basis of race in the context of a jury strikes at the most fundamental values of our judicial

system and our society as a whole, this Court has reversed cases where such has been found to exist without any inquiry as to whether a party was actually prejudiced. Rose v. Mitchell, supra; Vasquez v. Hillery, supra (and the cases cited therein.) Thus, for more than a century, this Court has recognized that racial bias in the context of jury formation will be corrected without regard to prejudice. Id. The result should be no different where the insidious racial bias is implanted in the jury through racially divisive comments of the trial court. Although U.S. v. Olano did not address which cases fit that special category of plain error where no showing of prejudice is necessary for reversal, this Court has previously determined that the case at bar is of the character which this Court will correct without regard to prejudice or effect on the outcome. Rose v. Mitchell, supra, Vasquez v. Hillery, supra.

Although the Eighth Circuit, in its en banc decision, did not explicitly recite the standards set forth in U.S. v. Olano, they are implicit within the majority opinion. In concluding that the impracticality of determining what effect the racially divisive remark had on the jury, requiring a showing of actual prejudice, would be tantamount to declaring such remarks unreviewable and that the potential for prejudice was so great that no showing of actual prejudice was required, the Eighth Circuit cited Olano for the proposition that some forfeited errors may be corrected regardless of their effect on the outcome. Rush v. Smith, supra at 923 (en banc). The court further noted, citing Olano, that some errors should be presumed prejudicial if a specific showing of prejudice cannot be made. Id.; See also Rose v. Mitchell, supra; Vasquez v.

Hillery, supra. Whether the majority intended its opinion as stating these remarks were so egregious as to effect the structure of the proceeding such that no showing of prejudice is necessary, or that on the facts of this case a presumption of prejudice arises, is really of no import as the result is the same - no inquiry is made as to whether a party was actually prejudiced. Rose v. Mitchell, supra, Vasquez v. Hillery, supra.

> . . . it would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. Judges do not inhabit an ivory tower. Like others, we know that some members of any racial group acting as decision makers in a dispute between a person of their own race and a person belonging to another race may tend to favor those who are like themselves over those who are different. . . The Constitution cannot control such prejudices, but neither can it tolerate them . . . Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Edmonson v. Leesville Concrete Co., Inc., 860 F.2d 1308, 1314 (5th Cir. 1988).

Be that as it may, the dissent[4] in the Eighth Circuit en banc decision argues that to reverse for plain error, Rush must establish a threshold showing that a high risk of prejudice existed in the circumstances of the present case, or must show specific prejudice. Rush has clearly done so.

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[4] The dissent notes that there is no allegation that the judge was actually biased or lacked impartiality. Rush v. Smith, supra, 927 Note 3. However, as this Court noted in Vasquez v. Hillery, supra at 263, ". . . his actual motivations are hidden from review, and we must presume the process was impaired." Nor is it any consolation to one denied the equal protection of the laws that it may have been done in good faith. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

Even the dissent in the Eighth Circuit en banc decision concedes that the first two elements of the Olano test are met: there was an error and the error was plain. Rush v. Smith, supra at 925 (en banc). The dispute was as to the third element: that the error affected substantial rights. U.S. v. Olano, supra at 1777, 1778.

A review of the evidence and a comparison of witness credibility shows not only that Rush has met the threshold of showing of a high risk of prejudice such as to raise a presumption of prejudice, but also that there was a substantial likelihood that the jury was actually infected with bias through the trial court's racially charged remarks.

The night the incident occurred was cold, and there was light snow on the ground. The police officers involved were wearing heavy jackets. With the exception of a light pair of pajama bottoms, Rush was naked. Although the officers maintained Rush was shot while outside, no blood was found in the snow. Not a single witness could identify Rush as one of the two individuals allegedly in the rear yard.

The officers testified that, from their vantage point, they could clearly determine the color of the suspect's trousers. This was starkly refuted by the police department's own evidence: the photograph of Smith and Hardison standing behind the vine covered fence where their trousers could not be seen - the evidence officer testified there was no reason to take the photograph other than to depict where the alleged suspects were standing, and which the trial court recognized as an obvious reenactment.

Both officers testified that they were under direct fire and that anywhere from 25-31 rounds from a 12-gauge shotgun were fired directly at them. Yet, incredibly, no investigating officer could find the slightest amount of damage attributable to this massive amount of firepower. The shotgun would not even function in the manner the officers testified - this was established by their own expert.

Smith's testimony was simply unworthy of belief. When confronted by the prosecutor with the fact that his account was inconsistent with the physical evidence, he was more than willing to change his account of the incident. He moved Rush from the outside rear yard to inside the kitchen in his attempt to assure prosecution. Smith was afraid he would be sued if Rush was not sent to jail. The St. Louis Circuit Attorney dismissed all charges against Rush due to the inconsistency of the physical evidence with the police version of the incident - and, presumably, because of Smith's lack of credibility. Smith was, again, willing to change his testimony under cross-examination and admitted Rush may well have been inside the kitchen of his home when shot.

Rudderforth's testimony was wholly incredible. The jury would have to credit her with x-ray vision, given her ability to see through parts of buildings and other physical obstructions in the middle of the night, which photographic evidence from two separate sources established could not be seen in the brightness of daylight. Her testimony that the police knew that her boyfriend, who was present at her home when she was interviewed, had outstanding felony warrants for child molestation but the police

chose not to arrest him is more than mildly suggestive that some type of deal was struck for her testimony.

In contrast, Rush and his occurrence witnesses, all of whom were African-American, testified consistently with each other, consistent with their statements given to the police, and consistent with the physical evidence - which does not have the ability to perjure itself.

The uncontradicted medical evidence supported Rush's version that he was bent at the waist when shot, and was contrary to the police version that Rush was standing upright when shot.

The physical evidence of the bullet holes and recovered bullet projectiles strongly supported Rush's version of the incident and was clearly inconsistent with Smith's version. There was no evidence presented that the critical hole through the screen, or middle portion, of the storm door was anything other than a bullet hole from a projectile fired by Smith. Even the special police Internal Affairs investigation confirmed this as a bullet hole, and Defendants' expert could offer no opinion that it was not.

In order for the jury to return a verdict for Defendants, it had to disregard the substantial credibility problems with Defendants' main witnesses and ignore the clear physical evidence. That the verdict was influenced by egregious, racially divisive remarks of the trial court is more than a mere possibility - certainly, at a minimum, the facts and circumstances of this case constitute a threshold showing that a high risk of prejudice was present.

The Court of Appeals for the Eighth Circuit simply did not depart from prior precedent in deciding that the racially divisive

comments of the trial court constituted plain error in the circumstances of this case.

II. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO DIVERGENCE OF THE COURTS OF APPEALS ON THE QUESTION PRESENTED HEREIN.

Research has disclosed no other cases where a federal trial judge has made racially divisive comments appealing to the xenophobic tendencies of the jury. As noted in the previous section, comments appealing to bias or xenophobia have met with universal condemnation.

A principle purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeal. Braxton v. United States, 500 U.S. 344, 347 (1991). The scarce judicial resources of this Court should not be consumed by a grant of certiorari to review the egregious commentary of the trial court in this case when there is, in fact, no conflict among the Circuit Courts of Appeal.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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